a bill and keep regime by virtue of their customers' ability to terminate calls on CMRS networks. This resulting value negates the notion that the LECs are giving something away for nothing.

C. The LECs Seek to Block Interconnection Reform by Arguing that the Funds are Needed to Cover Common Costs and Universal Service Obligations

The LECs make two closely related arguments about current LEC-CMRS interconnection charge levels: (1) that they are needed to contribute toward common costs; and (2) that they are needed to provide universal service subsidies. Both arguments are seriously flawed.

The allocation of common costs and the generation of subsidy revenues are important issues: issues that should not, and have not, been delegated to the LECs to decide. These issues should be decided by policy makers, not LEC negotiators. Because CMRS providers represent potential competition for wireline local exchange facilities, and because LEC interconnection is a vital input into the production of CMRS services, LECs can be expected to seek inefficiently high overhead loadings and subsidy recovery from interconnection services.[34] As the business models for many CMRS providers move toward increasingly direct competition with LECs, this effect can be expected to worsen.

Not surprisingly, given LEC misincentives and the absence of a process even to consider - let alone protect - the public interest, the current LEC-CMRS

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33 (...continued)
the interference with property can be characterized as a physical invasion by government); *see also Ex Parte* Submission of the Cellular Telecommunications Industry Ass'n, filed Dec. 8, 1995 in CC Docket No. 95-185.

34 LECs have made similar charges against IECs in the Commission's Caller ID proceeding. *See, e.g.*, Comments of BellSouth filed May 18, 1994 in CC Docket No. 91-281 alleging that IECs have an incentive to charge LEC for calling party number to increase LEC costs.

interconnection pricing regime does not recover subsidy burdens in an efficient way. The LECs' own economists criticize the levels and structure of current interconnection charges.[35] LEC economists and others note that pricing above long-run incremental cost distorts economic incentives.[36] LEC economists also state that it is better to tax retail calling services rather than inputs such as interconnection.[37]

From a public interest perspective, imposing subsidy burdens on potential competitors to the subsidized services is particularly counter-productive. Raising subsidies from a potential competitor, such as a CMRS provider, is self-defeating. The resulting handicap may deter the entry of a potential rival, even when that firm has lower costs than the incumbent LEC. Such a policy is particularly unfair and inefficient given that only LECs are eligible for the subsidies. The Telecommunications Act of 1996 is right to seek broad-based contribution, including from CMRS providers, but this must be

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35 *See, e.g.*, Crandall Bell Atlantic Statement, *supra* note 6, at 10-12 ("Current cellular interconnection charges typically ignore the effects of volume and time of day and therefore are likely to be inefficient . . . [t]here is no doubt that a more efficient approach to setting interconnection rates than are generally employed by LECs and CMRS providers could be devised."); Hausman SBC Testimony, *supra* note 6, at 6 ("This lack of reciprocal pricing leads to economic inefficiencies and reduced competition.").

36 *See, e.g.*, Hausman SBC Testimony, *supra* note 6, at 5; *see also* Hausman Pacific Bell Statement, *supra* note 6, at 7.

37 *See, e.g.*, Hausman Pacific Bell Statement, *supra* note 6, at 23 ("Economic analysis demonstrates that you should tax final goods and services, not intermediate goods."); *see also* NYNEX, Affidavit of William E. Taylor at 28-29 ("Taylor Affidavit"). Mr. Taylor acknowledges that there is a general economic principle stating that it is better to tax final goods (to cover subsidies and common costs) than intermediate goods like interconnection. Mr. Taylor tries to argue, however, that telecom is a possible exception. Mr. Taylor incorrectly argues that, if there are absolutely no substitution possibilities for the use of LEC interconnection facilities, then there is a benefit from taxing interconnection. Taylor's error is evidenced in his elasticity example in footnote 61, where he neglects the fact that a given tax amount represents twice the percentage increase at the intermediate level as at the retail level and thus exactly offsets the elasticity effect in his example. Taylor Affidavit at 29, n. 61.

done in a way that promotes, rather than harms, competitive neutrality. The protection of competitive neutrality must extend to the market for local exchange services. While the overall reform process will take time, in the interim the Commission should not take actions—such as allowing LECs to place increasing subsidy burdens on CMRS providers—that will compound the problems of the current system.

In addition to having the proper rate structure, it is important that LECs not be allowed to over-recover costs. This public policy task is made more difficult by the fact that the LECs spend considerably more time talking about the existence of interconnection costs and contribution, than they do providing data. Local service, vertical calling features, intra-LATA toll calling, interexchange access, and other services all contribute toward the recovery of the LECs' embedded costs. So, too, apparently does LEC-CMRS interconnection. As LEC-CMRS traffic volumes have dramatically increased over the past ten years, so have the amounts that CMRS providers are paying in excess of the incremental costs of interconnection. The LECs should not be allowed to collect ever-increasing amounts of so-called "contribution" from CMRS providers unchecked by the scrutiny of public policy makers.

Rather than seek ever-increasing amounts of subsidy from CMRS providers and others, the LECs need to do more to reduce their costs. Simply allowing LECs to make claims of high costs and then charge accordingly is both unfair to those charged and inefficient in that it provides little incentive for cost reduction. This is just the sort of problem that led to the adoption of LEC price caps and is a concern in the administration of universal service programs to support high-cost areas.

Ultimately, the LECs are asking to be protected from competition, both directly and indirectly. Directly, because they are asking to be guaranteed that they can cover their costs, without regard for what those costs should be. Indirectly, because they want to be able to raise actual and potential rivals' costs. The fact that LECs are able extract subsidy contributions under the current arrangements (something no competitive firm could do) demonstrates that they are exercising market power today. Not surprisingly, they want to continue doing so.

D. LECs Mistakenly Claim that They are Entitled to Unequal Compensation for LEC-CMRS Interconnection.

Some might argue that the co-carrier model is inappropriate because it calls for the two interconnection parties to share costs and responsibilities. In particular, LECs argue that it is possible to determine which network benefits more from interconnection and that some notion of fairness dictates that this party bear more of the costs.[38] These arguments are misguided.

Because of the differences in network sizes, each individual customer on the CMRS network generally benefits by a greater amount than does a customer on the LEC network. But, while the per-customer network effects are larger on the CMRS network, a much greater number of customers on the LEC network benefit. *A priori*, it is impossible to say which total set of subscribers derives the greater aggregate benefit from interconnection.

CMRS providers typically are the party seeking LEC-CMRS interconnection. This fact should not be taken as an indicator that most of the benefits accrue to the CMRS service provider and its subscribers, and thus that they should pay the costs of interconnection. The LECs' reluctance to provide interconnection is more accurately interpreted as a sign of LEC market power. Absent interconnection, a LEC remains a viable business entity. Most CMRS providers would find it impossible to survive absent connection to wireline networks. LECs can be expected to exploit this fact: (1) to extract a high price for interconnection; and (2) to attempt to limit interconnection in order to block entry and/or weaken existing competitors. While the

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[38] *See, e.g.*, Comments of U S WEST at ix-x; 31-32.

desire to exercise and protect market power makes interconnection relatively less attractive to LECs, the true social benefits of interconnection accrue to both wireline and wireless networks.

U S WEST argues that the pricing of the Internet shows that smaller networks should pay larger networks for interconnection.[39] In doing so, U S WEST is confusing different notions of size. The important measure of size in the LEC-CMRS context is the number of subscribers. But the larger networks in U S WEST's Internet discussion are those providing national backbone facilities or regional links, as opposed to local service providers.[40] Thus, the interconnection payments are between providers at different levels in the Internet hierarchy. While this analogy may provide some insight into the interconnection of LECs and interexchange carriers, it is not appropriate for a co-carrier situation, such as LEC-CMRS interconnections.

E. Despite Evidence to the Contrary, LECs Claim that Bill and Keep will Lead to Arbitrage by CMRS Providers

The LECs claim that bill and keep will lead to arbitrage, but they provide no evidence that CMRS providers will engage in it.[41] There is, however, evidence to the contrary. There exist differences today in what different parties pay for interconnection, access, and local calling. AirTouch has refrained from exploiting these arbitrage opportunities and is prepared to make commitments to continue to do so in the future. The LECs can also secure protection through appropriate contractual or tariff

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39 Comments of U S WEST at 31.

40 *Id.* at B.20-B.24.

41 *See, e.g.*, Comments of Pacific Bell at iv, 11-12; Ameritech at 8; NYNEX at 31; U S WEST at 42.

provisions.[42] Moreover, the Commission does not have to rely solely on the goodwill of CMRS providers to prevent arbitrage. The Commission has the power to enforce its rules and can deal with violations, if any arise. It is unfair to convict interconnectors before a crime has been committed. It is perhaps even more unfair to punish consumers by reducing competition and raising prices.

F. LECs Claim that Interim Bill and Keep will Create its Own Constituency but the LECs Ignore Countervailing Forces

LECs claim that interim bill and keep will become permanent since it will create its own constituency.[43] While bill and keep clearly will create a constituency that would benefit from its retention, it will also create a constituency for change if it is an

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42 *See, e.g.*, BellSouth Telecommunications, Inc., Georgia Public Service Commission General Subscriber Service Tariff § A35.1.1.E & F (effective July 24, 1995).

> E. The services provided under this Tariff shall be used by the MSP in compliance with the terms and conditions of this Tariff and only for the handling of traffic in conjunction with the MSP's authorized services.
>
> F. The services provided by the Company shall not be connected together by the MSP for the purpose of completing a call from one landline telephone to another landline telephone except to the extent that the MSP is legally authorized and has obtained any required regulatory approval to complete such calls using services provided by the Company. Any such landline-to-landline call shall incur all applicable usage charges as provided in this Tariff for both the land-to-mobile and the mobile-to-land portions of the call.

43 *See, e.g.*, Comments of BellSouth at 21.

inefficient long-term policy.[44] The LECs clearly have the resources to make their voices heard in policy debates, whether before Congress or the Commission. Moreover, in arguing against bill and keep, the LECs are arguing for retention of the current monopolized regime, a regime that clearly is in need of reform. Bill and keep will create incentives for the LECs to be more forthcoming with cost data needed to undertake that reform.

If the Commission is concerned about its ability to carry out policy making in the future, then it should deal with this problem by announcing a termination date up front, or by defining clear triggers based on either policy milestones (*e.g.*, interexchange access reform or universal service reform) or market developments (*e.g.*, the emergence of a significant competitor in the provision of local loop services). Rather than attempt to address this issue seriously, the LECs offer no guidance.

G. LECs Denounce Bill and Keep as Soviet-Style Central Planning Because They Want to Remain the Central Planners

The LECs denounce bill and keep as Soviet-style central planning. This is rhetoric, not logic. Still, it is worth noting the inconsistency of their claims. It is the LECs who want to be the central planner, deciding how common costs, subsidies, and profits are collected from different customers of monopolized local services. These decisions are appropriately made by public policy makers, not self-interested private parties.

V. THE COMMISSION IS VESTED WITH EXCLUSIVE AUTHORITY OVER LEC-CMRS INTERCONNECTION

One of the fundamental issues in this proceeding is whether the Commission possesses the authority to preempt state regulatory authority over LEC-

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[44] It is worth noting that the policy proposed in these reply comments may turn out to be an efficient long-term solution.

CMRS interconnection. The differing viewpoints were predictably divided — with wireless carriers on one side, and local telephone companies and state commissions on the other. The wireless carriers generally focus on the revisions to Sections 332 and 2(b) adopted in the Omnibus Budget Reconciliation Act of 1993,[45] while opponents to the Commission's preemptive power place greater emphasis on Sections 251 and 252 of the Telecommunications Act of 1996.[46]

The debate over this issue demonstrates that the Budget Act and the 1996 Act, when read together, are perhaps susceptible to more than one meaning with respect to the Commission's LEC-CMRS preemption authority. However, in such event, as CTIA notes, the Commission should resolve any ambiguities in furtherance of its policy objectives, which clearly support establishment of a federal LEC-CMRS interconnection policy. Such determinations, under *Chevron*, are entitled to deference.[47]

Having said this, however, AirTouch firmly believes that the arguments heavily support the conclusion that (1) the Budget Act revisions to Sections 2(b) and 332, particularly the addition of Section 332(c)(1)(B), clearly vest the Commission with exclusive authority over LEC-CMRS interconnection, and (2) the 1996 Act intentionally left this jurisdictional scheme intact.

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45 *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A) and § 6002(b)(2)(B), 107 Stat. 312 (enacted Aug. 10, 1993) ("Budget Act").

46 Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) ("1996 Act"). Indeed, some parties even suggest that the 1996 Act moots the instant proceeding. *See, e.g.* Comments of U S WEST at 57-59; Bell Atlantic at 14-16; NYNEX at 3-11; Pacific Bell at 1-5; SBC at 3.

47 *See, e.g.* Comments of Cellular Telecommunications Industry Ass'n ("CTIA") at 57 and n.102, *citing Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

A. The Budget Act

The 1993 Budget Act revisions to the Communications Act of 1934 completely overhauled the regulatory scheme applicable to CMRS. The purpose of these revisions, Congress explained, was to:

> [F]oster the growth and development of *mobile services* that, by their nature, *operate without regard to state lines* as an integral part of the *national telecommunications infrastructure*.[48]

In recognition of the inherently *interstate* nature of CMRS, Congress took action to place exclusive authority over CMRS regulation in the hands of the Commission. Congress achieved this jurisdictional shift from the states to the federal government through the adoption of Section 332(c), entitled "Regulatory Treatment of Mobile Services," which sets forth Congress' detailed regulatory blueprint for *federal* regulation of the CMRS industry, and through a contemporaneous amendment to Section 2(b) of the Communications Act.[49] These statutory revisions eliminate state authority over all regulatory aspects of CMRS relevant to this proceeding — including matters related to LEC-CMRS interconnection — without regard to any interstate or intrastate components of these services.

1. Section 332(c)(1)(B)

The pivotal statutory provision for purposes of establishing jurisdiction over LEC-CMRS interconnection is Section 332(c)(1)(B). This section provides:

> Upon reasonable request of any person providing commercial mobile service, the Commission shall order a

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48 H.R. Rep. No. 103-111, 103d Cong. 1st Sess. 260 (1993) (emphasis added).

49 *See, e.g.*, Brief for Respondents (Federal Communications Commission) at 24, *Connecticut Dept. of Pub. Util. Control v. FCC*, No. 95-4108 (2d Cir. 1996). ("Congress . . . charged the Commission with creating a national regulatory scheme for all wireless services." (emphasis added)). As discussed below, the amendment to Section 2(b) of the Act clarified that the Commission would possess authority over *all* CMRS offerings, including those provided on an *intrastate* basis.

> common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

Numerous commenters note the importance of this provision.[50] Indeed, even several commenters opposed to the Commission's exercise of preemption in this proceeding agree that this is the relevant statutory provision for purposes of LEC-CMRS interconnection.[51] This latter group of commenters, however, attempts to minimize the significance of this provision by suggesting that Section 332(c)(1)(B) merely authorizes the Commission to *respond* to requests for interconnection by CMRS providers.[52] This contention is unpersuasive because it ignores the language of Section 332(c)(1)(B), which authorizes the Commission to order interconnection "pursuant to the provisions of Section 201 of

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50 *See, e.g.*, Comments of AT&T at 29; CTIA at 62; Omnipoint at 13-14; Western Wireless at 18; Cox Enterprises at 39; Comcast at 32-33; Century Cellunet at 13; Telecommunications Resellers Ass'n at 13.

51 *See, e.g.*, Comments of BellSouth at 34 ("Congress addressed the issue of LEC-CMRS interconnection not in Section 332(c)(3) but in section 332 (c)(1)(B)"); Pacific Bell at 99 ("Interconnection between LECs and CMRS is covered by Section 332(c)(1)(B) not 332(c)(3) . . . ."); United States Telephone Ass'n at 17 ("USTA") ("Section 332(c)(1) [is] the most direct statement by Congress on interconnection in the 1993 Budget Act . . . ."); N.Y. Dept. of Pub. Service at 13-14.

52 *See, e.g.*, Comments of USTA at 17 ("Section 332(c)(1) . . . expressly limits the Commission's jurisdiction to responding to a request for interconnection; it does not suggest that the Commission should prescribe rates for interconnection in lieu of what parties might otherwise negotiate."); BellSouth at 34-35 ("Rather than preempt State regulation of interconnection charges, Congress [in adopting Section 332(c)(1)(B)] chose only to establish a guaranteed right to interconnection, by providing that the FCC must entertain requests by CMRS providers to order a LEC to provide interconnection pursuant to Section 201."); Cellular Resellers Ass'n at 10 ("Congress merely required — in Section 332(c)(1)(B) — that the Commission 'respond' to a request for interconnection . . . .); Ameritech at 11("the clear intent of Congress was to limit the Commission's authority to the act of responding to a request for interconnection.").

this Act." Some commenters attempt to downplay the importance of this reference to Section 201,[53] and others ignore it entirely.[54] But the fact remains that Section 201 requires carriers to furnish interconnection upon reasonable request, and at just and reasonable rates.[55] The Commission's clearly-assigned role under Section 332(c)(1)(B), then, is to ensure that all CMRS providers are able to obtain interconnection from LECs at reasonable costs.[56] This is precisely what the Commission is proposing to do in this proceeding.

Other commenters assert that Section 332(c)(1)(B) did not expand the Commission's existing Section 201 authority as it relates to LEC-CMRS interconnection.[57] However, they conveniently ignore the second sentence of Section 332(c)(1)(B), which provides that "[e]xcept to the extent that the Commission is required

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53 *See, e.g.*, Comments of N.Y. Dept. of Pub. Service at 14; Pub. Util. Comm. of Ohio at 4-5; BellSouth at 34-35.

54 *See, e.g.*, Comments of USTA at 16-19; Ameritech at 11; Cellular Resellers Ass'n at 10.

55 Section 201 of the Communications Act has served as the jurisdictional basis for numerous industry-wide Commission mandated interconnection requirements. *See, e.g.*, *Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Dockets 91-141 and 92-222, *Memorandum Opinion and Order*, 9 FCC Rcd 5154, ¶¶ 18-20 (1994) (implementing expanded interconnection for Tier I LECs, and related rate structure and pricing policies); *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carriers (Cellular Interconnection)*, Declaratory Order, 2 FCC Rcd 2910, ¶¶ 17, 21 (1987) (asserting jurisdiction over the physical interconnections between cellular and landline carriers and mandating that the terms and conditions of cellular interconnection be negotiated in good faith).

56 The Commission is therefore assigned the responsibility to ensure that the charges, practices, classifications, and regulations associated with LEC-CMRS interconnection are just and reasonable.

57 *See, e.g.*, Comments of N.Y. Dept. of Pub. Service at 13-14; Pub. Util. Comm'n of Ohio at 4-5.

to respond to a [CMRS provider's request for interconnection], this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act." (emphasis added). The underscored language confirms that the Commission's authority under Section 201 is indeed changed by Section 332(c)(1)(B) *in circumstances where the Commission is dealing with interconnection requests by CMRS providers*. In other words, the Budget Act *does* expand the Commission's Section 201 jurisdiction, but *only* insofar as LEC-CMRS interconnection is involved.[58]

Many commenters properly note that the legislative history underlying the adoption of Section 332(c)(1)(B) further supports the conclusion that the Commission, rather than the states, was assigned the exclusive authority to oversee matters related to LEC-CMRS interconnection.[59] Section 332(c)(1)(B) was adopted because:

> [t]he Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.[60]

The Commission was thus charged with the responsibility to "promote" interconnection in order to further Congress' vision of a national CMRS network. Significantly, there is *no* mention of any state role or function in the achievement of these goals.

In attempting to minimize the importance of the Budget Act changes, one commenter, Pacific Bell, offers the conclusory claim that "Section 201 has never been

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58 This is an important point because, as discussed below, the 1996 Act expressly preserved the Commission's existing Section 201 authority. This would include the additional Section 201 powers that were assigned to the Commission in the Budget Act with respect to LEC-CMRS interconnection.

59 *See, e.g.*, Comments of Comcast Corporation at 28-35; Cox Enterprises Inc. at 37-39; Personal Communications Industry Association ("PCIA") at 16-18; Comments of Sprint Spectrum/APC at 38-40; Celpage, Inc. at 10-11.

60 H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993).

thought to trump state rate making authority under Section 152(b)."[61] While this may be true as a general proposition, it is clearly *not* the case with LEC-CMRS interconnection. Prior to the adoption of the Budget Act in 1993, the Commission's jurisdiction under Section 201, with some exceptions, was limited to *interstate* services by virtue of Section 2(b) of the Act, which reserved to the states jurisdiction over intrastate services. The Budget Act revisions to Sections 2(b) and 332 of the Communications Act, however, changed that dual jurisdictional scheme by eliminating the interstate/intrastate jurisdictional dichotomy with respect to *CMRS*. Specifically, Section 2(b) was amended to clarify that the reservation of state authority over intrastate services expressly did not extend to services covered by Section 332 - namely, mobile services.[62] Moreover, and as discussed above, pursuant to Section 332(c)(1)(B) of the Budget Act, jurisdiction over all LEC-CMRS interconnection was delegated exclusively to the Commission *without regard* to any interstate or intrastate components of the underlying CMRS services.

2. Section 332(c)(3)(A)

The foregoing discussion demonstrates Congress' decision to delegate to the Commission exclusive regulatory authority over LEC-CMRS interconnection. A number of parties in this proceeding also focus much of their attention on Section 332(c)(3)(A) of the Budget Act, which expressly preempts state rate and entry authority over CMRS. This section provides, in pertinent part, that: "[n]otwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . ." Pacific Bell and Bell Atlantic concede that under this provision, "[a]rguably, the FCC may have jurisdiction to

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61 Comments of Pacific Bell at 99.

62 Section 2(b), as amended, now reads: "Except as provided in . . . Section 332 . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio of any carrier . . . ."

ensure that, in setting or approving particular interconnection agreements, the States do not effectively preclude entry by CMRS providers."[63] These parties therefore grudgingly admit that state actions with respect to LEC-CMRS interconnection which serve to inhibit entry would properly be subject to preemption by the Commission.[64] High interconnection rates certainly inhibit entry — especially CMRS entry into local loop competition with LECs. Thus, Section 332(c)(3)(A) also provides a basis for assertion of Commission jurisdiction over LEC-CMRS interconnection issues.[65]

B. The 1996 Act

As discussed above, the Budget Act revisions to Sections 332 and 2(b) of the Communications Act, particularly the addition of Section 332(c)(1)(B), clearly delegated to the Commission exclusive jurisdiction over LEC-CMRS interconnection matters, both interstate and intrastate. The critical question at issue, then, is whether Congress reversed its position less than three years later when it enacted the 1996 Act.

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63 *Ex Parte* Letter from Michael K. Kellogg, Counsel for Bell Atlantic and Pacific Telesis, to William F. Caton, Acting Secretary, Federal Communications Commission, in CC Docket No. 95-185 on Feb. 26, 1996, at 5 ("Kellogg Letter"). Many parties favoring preemption also made this point. *See, e.g.*, Comments of Celpage at 11-12; CTIA at 67-68; Centennial Cellular at 28-29; Time Warner at 24-31; PCIA at 16-17; *see also* Comments of Bell Atlantic/NYNEX Mobile at 21.

64 *See also* Comments of NYNEX at 42; Ameritech at 12; USTA at 20; Pacific Bell at 99-101. As discussed below, Section 253(e) of the 1996 Act expressly preserves the entry preemption prescribed in Section 332(c)(3) of the Budget Act. The elimination of state-imposed entry barriers thus continues to be an important component of Congress' federal regulatory model.

65 Pacific Telesis and Bell Atlantic seek to minimize the impact of this interpretation by asserting that "a general authority to sweep away state-imposed barriers to entry does not entail any authority to mandate the particular terms and conditions of interconnection." Kellogg Letter at 5. As discussed above, however, the Commission's authority to direct LEC-CMRS interconnection arrangements need not be found in Section 332(c)(3)(A), which preempts state entry jurisdiction. Rather, the Commission's authority to do so is clearly articulated in Section 332(c)(1)(B), which directs the Commission to order LEC-CMRS interconnection "pursuant to the provisions of section 201 of this Act."

AirTouch submits that a review of all relevant statutory provisions strongly supports the proposition that the Commission's plenary authority over interstate and intrastate LEC-CMRS interconnection, as prescribed in the Budget Act, was not affected by the passage of the 1996 Act. In other words, having already established a comprehensive regulatory scheme to govern CMRS in the Budget Act, Congress addressed the remainder of the telecommunications industry with the regulatory changes adopted in the 1996 Act.[66]

Many preemption opponents claim that Section 251 of the 1996 Act expressly preserves state authority over the terms and conditions of local interconnection arrangements, and that Section 252 authorizes the states to serve as arbitrators in interconnection disputes.[67] Some of what these commenters say is true, but in AirTouch's view, they do not satisfactorily come to grips with the principal question at hand — that is, how to reconcile the power taken away from the states by the Budget Act with respect to CMRS interconnection, with the general interconnection authority given to the states in

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[66] This point was underscored by Representative Fields when Congress commenced consideration of the legislation leading up to the 1996 Act:

> Last year we began the process of building a national telecommunications infrastructure when we adopted a regulatory framework for wireless services built on the same concepts contained in H.R. 3636. Today, we will take the next step in the process of crafting a national telecommunications policy as we turn our attention to other sectors of the telecommunications industry.

To Supersede the Modification of Final Judgment Entered Aug. 24, 1982, in the Antitrust Action Styled United States v. Western Electric, Civil Action No. 82-0192, United States Dist. Ct. for the District of Columbia To Amend the Communications Act of 1934 To Regulate the Manufacturing of Bell Operating Companies, and for Other Purposes: Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance of the House Committee on Energy and Commerce, 103d Cong., 1st Sess. 117 (1993)(statement of Rep. Jack Fields).

[67] Comments of Pacific Bell at 92-93; USTA at 15-16; BellSouth at 32-33; Ameritech at 12; NYNEX at 43; GTE at 42-43.

the 1996 Act. In AirTouch's view, Congress clearly carved out a distinct regulatory scheme for CMRS in the Budget Act, expressly removing even intrastate services — including LEC-CMRS interconnection — from the purview of state authority. Had Congress intended to hand that jurisdiction back to the states in the 1996 Act, it would have done so explicitly, by repealing or at least amending Section 332(c)(1)(B).[68] It did not do so.

Indeed, Congress did the contrary — it expressly stated in Section 251(i) of the 1996 Act that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under Section 201."[69] The scope of the Commission's authority under Section 201, as demonstrated above, was expanded by the Budget Act insofar as interstate and intrastate LEC-CMRS is concerned. In turn, Section 251(i) of the 1996 Act preserved the Commission's existing Section 201 authority over CMRS services — as expanded in the Budget Act.

Pacific Bell and Bell Atlantic claim that Sections 251 and 252 are "consistent with 151(b)'s preservation of state authority over charges for intrastate communications services,"[70] and that Section 251 "expressly preserves State authority over the terms and conditions of local interconnection arrangements."[71] This statement, while true as a general proposition, is flatly mistaken in the CMRS context, where

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68 There is no basis for conjecture that Congress intended implicitly to shift LEC-CMRS jurisdiction back to the states, particularly given the explicit elimination of that authority in the Budget Act.

69 Section 251(i) of the 1996 Act. *See also* H.R. Rep. No. 458, 104th Cong., 2d Sess. 123 (1996)("New section 251(i) makes clear the conferees' intent that the provisions of new section 251 are in addition to and in no way limit or affect, the Commission's existing authority to order interconnection under section 201 of the Communications Act.").

70 Kellogg Letter at 2.

71 *Id.*

Congress previously eliminated state jurisdiction over intrastate CMRS offerings. Thus, Congress could not "preserve" state authority in the CMRS context because such authority had already been limited by the Budget Act. Nothing in the 1996 Act suggests that Congress intended to reinstate the states' CMRS authority. Opponents to preemption are thus reduced to relying on provisions of general applicability to interconnection. These provisions, however, make no specific reference to LEC-CMRS interconnection, as was done in Section 332(c)(1)(B) of the Budget Act.[72]

Some commenters opposed to preemption admit that the Commission is empowered to develop general guidelines applicable to interconnection but, beyond this, claim the Commission has no role to play unless the states fail to satisfy their statutory obligations.[73] There is a gaping hole in this logic, however. This would mean that the Commission has essentially been denied jurisdiction over *all* interconnection matters -- including purely *interstate* LEC-CMRS interconnection — and that the states have instead been chosen by Congress to serve in that role. This fundamental shift in jurisdiction away from the Commission obviously was not Congress' intent, as evidenced, in part, by the express retention of the Commission's Section 201 authority (even putting aside

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72 It is noteworthy that Congress *did* expressly modify the regulatory scheme for CMRS adopted in the Budget Act where necessary to achieve its objectives. For example, the Commission's forbearance authority under Section 332(c)(1)(A) was expanded pursuant to new Section 401(a), and Section 332(c) itself was amended by Sections 704 and 705 of the 1996 Act.

73 This fallacy is highlighted by Pacific Bell and Bell Atlantic in their contentions that (1) "the FCC has no authority to dictate any particular form of compensation arrangement beyond Section 251's general mandate of reciprocal compensation." Kellogg Letter at 3; and (2) "[t]he Commission itself has no role to play in the Section 252 process, unless a state Commission simply fails to act." *Id.* *See also* Comments of SBC at 7

Congress' failure to repeal Section 332(c)(1)(B), which completely eliminated the states' role even in *intrastate* LEC-CMRS interconnection matters).[74]

In fact, it is noteworthy in this context that Sections 251 and 252 actually *expand* the scope of the Commission's authority under Section 2(b). As noted in AirTouch's initial comments:

> Whereas state regulatory commissions heretofore enjoyed largely unfettered authority over intrastate regulatory matters, the 1996 Act imposes detailed constraints and parameters on the scope of such authority. Moreover, while the states have been given an active role in arbitrating disputes between LECs and telecommunications carriers, they have always played such a role. Now, their actions must also be consistent with a wide range of federal regulations to be prescribed by the Commission to implement the legislation . . . .[75]

Thus, the 1996 Act serves to give the Commission authority over intrastate matters that it did not possess before. But this is all merely academic in the CMRS context in any event, since CMRS services, pursuant to the Budget Act revision to Section 2(b), are no longer governed by the interstate/intrastate jurisdictional scheme applicable to other telecommunications services.

Finally, in support of their position, most commenters opposing preemption point, in particular, to the expansive definition of "telecommunications carrier" in the 1996 Act,[76] and note that the interconnection provisions set forth in Sections 251 and 252 apply to *any* telecommunications carrier, a term which encompasses CMRS providers.[77] While this contention appears to have some merit, there are two arguments which belie the

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74 *See, e.g.*, Section 251(i).

75 Comments of AirTouch at 52 (citations omitted).

76 This term, as defined in Section 3(a)(2)(49) of the 1996 Act, "means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). . . ."

77 *See, e.g.*, Comments of GTE at 11-12; BellSouth at 4-5; NYNEX at 5-7; Bell Atlantic at 3-5; SBC at 8-9; U S WEST at 59-60; USTA at 15-16; Pacific Bell at 92-93.

proposition. First, within Section 251 itself Congress added a "savings provision" at subparagraph (i) which provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201." The Commission's existing Section 201 authority, as noted above, includes Congress' grant of exclusive jurisdiction over both interstate *and* intrastate LEC-CMRS interconnection, as prescribed in Section 332(c)(1)(B). Congress' inclusion of the Section 201 savings provision, coupled with its failure to repeal Section 332(c)(1)(B), dictates the conclusion that Congress did not intend CMRS providers to be governed by Sections 251 and 252, notwithstanding the broad definition of "telecommunications carrier."

The second major shortcoming of this argument is its lack of consistency. Many telephone company representatives stated at a recent Commission Forum[78] that Sections 251 and 252 do *not* apply to interexchange carriers and access charges,[79] even though interexchange carriers, like CMRS providers, undoubtedly fit within the definition of "telecommunications carriers" in the 1996 Act. Simply put, these parties want to have it both ways — they interpret "telecommunications carriers" broadly when it suits their purposes, and carve out exceptions when it does not. Moreover, the distinction they are attempting to draw — that Sections 251 and 252 cover providers of local exchange services, not toll services — is misplaced for two reasons. First, the contention finds no support in the statutory language. Second, even if the distinction were appropriate, Sections 251 and 252 would not apply to CMRS providers because they do not provide

[78] *See* Public Notice, *Office of General Counsel to Hold Public Forum on Friday, March 15th to Discuss Interpretation of Sections 251 and 252 of The Telecommunications Act of 1996* (rel. Mar. 8, 1996).

[79] *See also Ex Parte* Communication of Bell Atlantic and Pacific Telesis dated Mar. 13, 1996 at 7, n. 9 ("In our view, access agreements for the origination and termination of toll calls are not covered by Sections 251 and 252.").

local exchange services,[80] a point the Bell Companies have consistently and vehemently been arguing for over a decade now.[81] This proposition repeatedly has been echoed by the Department of Justice,[82] and the Commission's adoption of MTA service areas for PCS further underscores the validity of this point.[83]

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80 Indeed, Section 3(a)(2)(44) of the 1996 Act expressly excludes CMRS providers from the definition of "local exchange carrier".

81 *See, e.g.*, Motion of the Bell Operating Companies For a Modification of Section II of the Decree to Permit Them to Provide Cellular and Other Wireless Services Across LATA Boundaries, Civ.-Action No. 82-0192, at 37 (June 20, 1994):

> The Department [of Justice] and the District Court have now had almost a decade of experience in dealing with the geographic boundaries of wireless services provided by BOC affiliates. It is no longer seriously disputed that landline LATAs are too small when imposed on wireless services. As this Court has explained, the LATA boundaries were drawn with reference to the landline telephone system, not the "significantly different" competitive issues implicated by wireless services. *United States v. Western Elec. Co.*, 578 F. Supp. 643, 648 (D.D.C. 1983). The BOCs' mobile operations cannot be confined within landline LATAs, the Court has held, without "substantially inconvenienc[ing]" mobile customers.

Id. at 648.

82 *See e.g.*, Motion and Proposed Order For a Waiver of Section II(D) of the Modification of Final Judgement at 8 (Jan. 9, 1987):

> Consumer demand for an integrated cellular mobile service throughout the entire area within which interested business persons work, live, and seek local recreation makes it appropriate for the BOCs to seek to offer cellular mobile telephone services that transcend LATA boundaries.

83 As noted by Omnipoint:

> The Commission rejected the cellular MSA and RSA service regions for PCS because '[t]he ten year history of the cellular industry provides evidence generally that these service areas have been too small for the efficient provision of regional or nationwide mobile service . . . .' Significantly, 43 of the 49 MTA license areas set by the Commission include territory of more than one state.

(continued...)

A final point related to the 1996 Act concerns the contention of several parties that the scope of Section 332(c)(3)(A) does not support the preemptive action proposed by the Commission in this proceeding. Focusing on the phrase "rates charged *by* any commercial mobile service," they claim that this provision does not address the interconnection rates charged by LECs *to* CMRS providers.[84] While AirTouch does not agree with this assessment, the argument is largely beside the point. If the Budget Act did preempt state authority over CMRS to LEC interconnection rates (but not LEC to CMRS interconnection rates), then the question arises how the states are to arbitrate LEC-CMRS interconnection disputes under Section 252 of the 1996 Act when they hold *no* authority over the rates charged by one of the two negotiating parties — namely, the CMRS providers. Had Congress actually intended the states to serve as arbitrators in LEC-CMRS interconnection disputes, as the parties opposed to preemption suggest, then Section 332(c)(3)(A) would have been repealed or at least modified to clear up the resulting confusion over the scope of the states' authority to act in this capacity. But Congress did no such thing — in fact, it expressly preserved the Commission's existing authority under Section 332(c)(3).[85]

C. Inseverability

As discussed in AirTouch's initial comments,[86] relevant precedent establishes that preemption of state regulatory authority is warranted in situations where

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83 (...continued)
Comments of Omnipoint at 11, *citing Memorandum Opinion and Order*, GN Dkt. No. 90-314, 9 FCC Rcd 4957, 4986 (1994).

84 *See, e.g.*, Comments of Pacific Bell at 97; NYNEX at 41; BellSouth at 34.

85 *See, e.g.*, Section 253(e) of the 1996 Act.

86 Comments of AirTouch at 48-50.

the interstate and intrastate components of a service are inseverable.[87] The record in this proceeding reflects that there are already a significant number of situations where CMRS and LEC networks do not have the technical capability to distinguish between interstate and intrastate calls. Given this inseverability, preemption by the Commission is appropriate notwithstanding any possible statutory ambiguities related to the jurisdictional questions.

This inseverability phenomenon is most pronounced in multi-state markets served by a single MTSO, an increasingly common occurrence for paging, cellular and PCS systems alike.[88] Assume, for example, a cellular or PCS system which covers states A, B and C, but which is served by a single MTSO located in state B. A LEC central office in state B will assume that all calls received from that MTSO are intrastate. The LEC is not equipped to ascertain that most of the calls delivered through that MTSO may, in fact, be interstate since they originated in State A or State C. There are a significant number of multi-state cellular systems currently served by a single MTSO, and the number of such systems will soon increase dramatically with the deployment of PCS systems based on multi-state MTAs.

Inseverability also arises in circumstances where a caller or called party using a mobile handset travels across state lines while the call is in progress. These situations underscore that the uniquely *mobile* nature of CMRS makes such services inherently interstate in nature.[89]

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87 *See, e.g.*, *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986).

88 *See, e.g.*, Comments of Sprint Spectrum/APC at 47; Omnipoint at 11; Vanguard Cellular Systems, Inc. at 24-25; Arch Communications Group, Inc. at 20-21; Rural Cellular Corp. at 12; Celpage at 12-13; AT&T at 23; CTIA at 80-81; Paging Network, Inc. at 34.

89 *See, e.g.*, Comments of Sprint Spectrum/APC at 48; Omnipoint at 11-12;
(continued...)

Commenters opposing preemption make only a half-hearted attempt to refute these points. Some parties appear to admit inseverability, but suggest that a flat percentage of calls can simply be designated as interstate as a method of curing the problem.[90] Others simply rely on the Commission's statement in 1994 that interstate and intrastate traffic can be severed for regulatory pricing purposes.[91] AirTouch submits that an up-to-date analysis of this issue, based on a thorough review of the comments and reply comments filed in this proceeding, will fully support the Commission's more recent statement that "preemption under *Louisiana PSC* may well be warranted here on the basis of inseverability."[92]

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89 (...continued)
Vanguard at 24-25; Celpage at 12-13; CTIA at 81; PCIA at 19. Yet another inseverability problem arises with respect to traffic delivered to a LEC by an entity that provides both CMRS and interexchange carrier services. This point was highlighted in a recent *ex parte* filing submitted by GTE:

> During the discussion, a question was raised concerning the ability of an [sic] LEC to distinguish CMRS traffic from other traffic such as IXC traffic. This issue is addressed on page 39 of GTE's Comments wherein we state that in cases where a party provides both CMRS and IXC services, GTE cannot operationally distinguish between CMRS traffic and IXC traffic.

Ex parte Statement submitted by Carol Bjelland on behalf of GTE, dated Mar. 11, 1996.

90 *See, e.g.*, Comments of NYNEX at 39-40; BellSouth at 33.

91 Kellogg Letter at 4, n.2, *citing CMRS Second Report and Order*, 9 FCC Rcd 1411, at
¶ 231 (1994); USTA at 20-21; *see also* BellSouth at 36; NYNEX at 39; U S WEST at 62 n.148.

92 *NPRM, supra* note 2, at ¶ 111. *See, e.g.*, Comments of the Connecticut Dept. of Pub. Utility Control at 5, noting that the Commission's earlier statement was a "preliminary analysis."

VI. CONCLUSION

In a speech given on March 19, 1996, Michele Farquhar, Acting Chief of the Wireless Telecommunications Bureau, made the following statement:

> Chairman Hundt recently said that our joint success should be measured by whether five years from now, American citizens, whether in their business or in their homes, have a greater choice of communications providers and services than ever before.[93]

AirTouch submits that if CMRS is to contribute fully toward the realization of this laudable goal, the Commission should adopt the LEC-CMRS interconnection proposals set forth above.

Ultimately the Commission and states will have to reform the pricing of all services utilizing local exchange networks. To do this, the Commission will have to: (1) develop reliable measures of LEC incremental costs; (2) determine, based on public policy considerations, how to allocate overheads and common costs; and (3) develop and implement a competitively neutral universal service mechanism.

In the interim, the Commission must choose among admittedly imperfect alternatives:

a. LECs generally argue that the current system is working and that policy makers should rely on private negotiations with the vague threat of government intervention sometime down the road if negotiations break down.

b. CMRS providers generally argue that bill and keep, coupled with appropriate cost sharing, is a simple and fair interim measure that will promote the efficient development of the CMRS industry in general and wireless local loop in particular.

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93 Remarks of Michele Farquhar, Acting Chief, Wireless Telecommunications Bur., Federal Communications Comm'n, to the Land Mobile Communications Council, Mar. 19, 1996, *in* FCC Daily Digest, Mar. 20, 1996, at 2133, 2137.

The record in this proceeding demonstrates that the current system gives rise to serious inefficiencies, and that the continuation of the status quo would not be a sound course for policy. Moreover, even if the Commission chooses to rely on private negotiations in the first instance, the Commission still should annunciate a policy for resolving disputes when the private parties reach an impasse. The Commission should mandate bill and keep for local switching and local loop, while imposing 50-50 cost sharing for other elements of interconnection. This policy is relatively simple, it is fair, and it will promote the efficient development of telecommunications competition.

AirTouch submits further that adoption of these proposals is well within the Commission's jurisdiction. By enacting the Budget Act of 1993, Congress fundamentally realigned the jurisdictional scheme applicable to CMRS. In particular, the Budget Act revisions to Sections 332 and 2(b) of the Communications Act, especially the addition of Section 332(c)(1)(B), delegated to the Commission exclusive authority over